BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions of Courts Below.

No opinion was delivered by the District Court. The Opinion of the Circuit Court of Appeals (Circuit Judges Denham, Mathews and Healy, Judge Mathews writing) was filed January 3, 1944, and appears at page 53 of the Transcript of Record. It is reported in 139 Fed. (2d) 667.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 U. S. C. A. Sec. 347). The Judgment of the Circuit Court of Appeals was entered January 3, 1944 (T. R. p. 57). The Petition for Rehearing was seasonably filed on January 18, 1944, and was denied on January 19, 1944 (T. R. p. 58). The Petition for Certiorari is filed within three months thereafter.

Federal Questions were, and are, presented involving the Federal Rules of Civil Procedure, and the:

Deprivation of petitioner of property without due process of law; and

Denial of his equal protection of the law.

Statement of the Case.

A statement of the facts and of the matter involved has already been made in the preceding petition, Page 1, which is hereby adopted and made a part hereof.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court dismissing the action by reason of the failure of petitioner

to come from Oregon to Arizona for the taking of his deposition.

2. In holding that petitioner (plaintiff below) could be required to travel from Portland, Oregon, to Phoenix, Arizona, at his own expense for the taking of his deposition.

3. In sustaining the order of the District Court requiring the petitioner to come to Arizona, and providing that the action would be dismissed upon his failure to do so. Also in sustaining a War Time Governmental requirement against unnecessary travel.

Argument.

First Point.

A non resident who brings a suit in a district court of the United States in a state far distant from his place of residence should not be compelled to go to the place where suit was brought for the purpose of having his deposition taken by the opposite party.

Prior to the adoption of the Rules of Civil Procedure for the district courts of the United States the accepted and usual course of proceedings in the taking of depositions of an opposite non resident party to a suit was that the deposition should be taken at the place of the residence or place of business of the party whose deposition was to be taken. This accepted and usual course of procedure was not changed by the Federal Rules.

Norton v. *Cooper Jarrett, Inc.* (D. C. N. Y.) 1 F. D. R. 92;

Cohen v. *Pennsylvania R. R. Co.* (N. Y. S. D.) 30 Fed. Supp. 419;

Fairweather Transportation Company v. *Chris-Craft Corp.*, 1 F. D. R. 509;

Lavarette v. *Continental Briar Pipe Company*, 25 Fed. Suppl. 80.

Especially has this been the case in the absence of any provision for the payment by the party desiring the deposition of the traveling and other expenses of the party to be examined. The trial court in makng the order requiring the petitioner to come to Phoenix, Arizona, from Portland, Oregon, and in ordering the dismissal of the action departed entirely from the accepted and usual procedure and this departure was sanctioned by the Circuit Court of Appeals. The Rules of Civil Procedure were promulgated not only for the purpose of expediting litigation and conserving the time of the courts, but also to serve to all parties the protection of the rights and interests which law and justice require.

Madison v. *Cobb,* 29 Fed. Supp. 975.

These purposes were not served by the action of the court in this case, and it is submitted that such action calls for the exercise by this Court of its supervisory powers in order that the error made and the resulting injustice may be corrected.

Second Point.

The trial court, which had all the facts and the objections of the petitioner before it at the time of its order of December 21, 1942, (T. R. p. 31) should not as was done by this order, have ordered the petitioner to appear at the office of the attorneys for the respondent in Phoenix, Arizona, for the taking of his deposition and such action should not have been upheld by the Circuit Court of Appeals.

At the time of the making of the order of December 21, 1942, there had been presented to the District Court by the Argument in opposition to the Motion to Dismiss (T. R. p. 27-30) filed December 18, 1942. All the facts,

including the residence of petitioner in Portland, Oregon, and the heavy expense and loss of time that would be occasioned by compelling the petitioner to come to Arizona. It must also have appeared to the court that there was very little, if any, reason for taking the deposition on oral examination, and that quite likely the respondents in giving the notice that they gave had in mind that in this way they might obtain the dismissal of the action. In disregard, however, of the facts the court made its order directing the petitioner to come to Arizona, and made no provision for the payment of his expenses. There is no authority for such procedure, and we believe that there is no other case in which such an order under similar circumstances has been entered or sustained, even in times of peace, and this was WAR TIME, with a ban on unnecessary travel, and to get gasoline for unnecessary travel an impossibility.

It may be claimed that since the petitioner did not, in the first instance, make a motion in accordance with Rule 30 (b) of the Federal Rules of Civil Procedure that the deposition shall not be taken, or that it may be taken, only, at some designated place other than that stated in the notice, or that it may be taken only upon written interrogatories, he should be precluded from objecting to the order made by the lower court. Such a claim, we submit, cannot prevail for the reason that opposition to the motion to dismiss (T. R. ps. 27-30) and the objections therein made served all the purposes of a motion under Rule 30 (b), and the order of December 21, 1942, requiring the petitioner to come to Arizona was made after this opposition had been filed and with the objections therein stated before the court. This being the case, the court should not have disregarded these objections and should not have made the order that was made.

THIRD POINT.

Since the order requiring the petitioner to come to Arizona from Oregon for the taking of his deposition was without right or authority of law, the order dismissing the action by reason of a failure to comply with such order should not have been entered or sustained.

The order requiring the petitioner to come to Arizona made no provision for the payment of his expenses. We have shown that under the facts before the court the order was unauthorized and should not have been made. It follows, of course, that the order dismissing the action should not have been sustained.

By this judgment an injustice has been done to the plaintiff and he has been deprived of substantial rights. In order that the Federal Rules of Civil Procedure may not be interpreted to authorize the hardships to non resident litigants in the Federal Courts that would result from the interpretation placed upon them by the District Court and the Circuit Court of Appeals, we believe that the questions here involved should be decided by this Court.

Wherefore, it is respectfully submitted that the foregoing petition for a writ of certiorari should be granted.

THOMAS A. FLYNN,
Counsel for Petitioner,
Address 313 North Center Street.